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IN THE

# Supreme Court of the United States

LOUIE A. FERRO, SR.,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

An expert selected by the United States examined Mr. Ferro, who is now 81 years of age, on an outpatient basis under 18 U.S.C. § 4241(b), and found him incapable to aid in his own defense due to permanent, untreatable brain damage caused by a stroke. Mr. Ferro respectfully submitted to the District Court that it would be unconstitutional to imprison for treatment a non-dangerous, untreatable person suffering from a mental illness or disorder. A subsequent order of the District Court of the United States for the Western District of Missouri directed the pretrial imprisonment of Mr. Ferro for up to four months for treatment under 18 U.S.C. § 4241(d)(1). The order of the lower court followed its determination that it had no authority to consider the permanent, untreatable nature of Mr. Ferro's condition. The Eighth Circuit Court of Appeals, on March 11, 2003, found that it had jurisdiction under the "collateral order doctrine" to consider the appeal, and affirmed the order of the lower court.

This Court's recent holdings in *Sell v. United States*, 539 U.S. __, 123 S. Ct. 2174, 2003 U.S. LEXIS 4594 (decided June 16, 2003), concerning this Court's jurisdiction under the "collateral order doctrine" and the requirement that lower courts consider if forced medication is substantially likely to render a defendant competent to stand trial are instructive on the questions in this case, but do not provide the precise answers needed to resolve the dispute involving Mr. Ferro.

The first question presented is whether this Court has jurisdiction under the "collateral order doctrine" to consider Mr. Ferro's Petition for a Writ of Certiorari.

The second question presented is whether it is constitutional to imprison for *treatment* a *non-dangerous, untreatable* person suffering from a mental illness or disorder.

The third question presented is whether 18 U.S.C. § 4241(d)(1) authorizes the imprisonment for *treatment* of an *untreatable* person incapable of assisting in his own defense due to a mental disease or defect.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Questions Presented | i |
| Table of Contents | iii |
| Table of Cited Authorities | iv |
| Table of Appendices | viii |
| Opinions Below | 1 |
| Statement of Jurisdiction | 1 |
| Statutory Provisions Involved | 1 |
| Statement of the Case | 2 |
| Reasons for Granting the Petition | 5 |
| I. This Case Presents An Important, Unresolved Jurisdictional Question. | 5 |
| II. This Case Presents An Important, Unresolved Constitutional Question. | 7 |
| III. This Case Presents An Important, Unresolved Statutory Question. | 13 |
| A. The Statutory Scheme | 13 |
| B. The Important, Unresolved Statutory Issue | 16 |
| Conclusion | 24 |

## TABLE OF CITED AUTHORITIES

*Page*

**Cases:**

*Addington v. Texas*, 441 U.S. 418 (1979) ..... 7

*Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949) ..... 5

*Compagnie Francaise de Navigation a Vapeur v. Louisiana Bd. of Health*, 186 U.S. 380 (1902) .. 7

*Flanagan v. United States*, 465 U.S. 259 (1984) ... 5

*Foucha v. Louisiana*, 504 U.S. 71 (1992) ..... 7

*Green v. Bock Laundry Machine Co.*, 490 U.S. 504 (1989) .....18, 19, 20

*Humphrey v. Cady*, 405 U.S. 504 (1972) ..... 7

*Jackson v. Indiana*, 406 U.S. 715 (1972) ....8, 10, 11, 12

*Kansas v. Hendricks*, 521 U.S. 346 (1997) ..... 7

*O'Connor v. Donaldson*, 422 U.S. 563 (1975) .... .....8, 11, 12, 24

*Robinson v. Shell Oil Company*, 519 U.S. 337 (1997) ..... 17, 18, 19, 20

*Seling v. Young*, 531 U.S. 250 (2001) ..... 7

*Sell v. United States*, 539 U.S. __, 123 S. Ct. 2174, 2003 U.S. LEXIS 4594 (decided June 16, 2003) .....i, 6, 12, 21, 24

*Cited Authorities*


| | Page |
|---|---|
| *United States v. Boigegrain*, 122 F.3d 1345 (10th Cir. 1997) | 6 |
| *United States v. Donofrio*, 896 F.2d 1301 (11th Cir. 1990) | 6, 11, 12, 16, 19 |
| *United States v. Filippi*, 211 F.3d 649 (1st Cir. 2000) | 5, 11, 12, 16, 19 |
| *United States v. Gaudin*, 515 U.S. 506 (1995) | 2-3 |
| *United States v. Gold*, 790 F.2d 235 (2d Cir. 1986) | 5-6 |
| *United States v. Shawar*, 865 F.2d 856 (7th Cir. 1989) | 11, 16 |
| *United States v. Sherman*, 912 F.2d 907 (7th Cir. 1990) | 6 |
| *United States v. White*, 887 F.2d 705 (6th Cir. 1989) | 6 |
| *Youngberg v. Romeo*, 457 U.S. 307 (1982) | 8, 10 |
| **Statutes:** | |
| 10 U.S.C. § 1077(a)(5) | 19 |
| 10 U.S.C. §1077(a)(7) | 19 |
| 18 U.S.C. § 2 | 2 |
| 18 U.S.C. § 371 | 2 |

*Cited Authorities*


| | *Page* |
|---|---|
| 18 U.S.C. § 982 | 2 |
| 18 U.S.C. § 1341 | 2 |
| 18 U.S.C. § 1956(h) | 2 |
| 18 U.S.C. § 2314 | 2 |
| 18 U.S.C. § 4241 | 1, 8, 13, 15, 20 |
| 18 U.S.C. § 4241(a) | 2, 9, 12, 13, 19 |
| 18 U.S.C. § 4241(b) | *passim* |
| 18 U.S.C. § 4241(d) | 12, 15, 16, 20, 21, 24 |
| 18 U.S.C. § 4241(d)(1) | i, ii, 5, 6, 12, 17 |
| 18 U.S.C. § 4246 | 1, 13, 15 |
| 18 U.S.C. § 4246(a) | 16 |
| 18 U.S.C. § 4247 | 1, 8, 13 |
| 18 U.S.C. § 4247(b) | 9, 12, 16, 19, 22, 23 |
| 18 U.S.C. § 4247(c) | 9, 12, 16, 19, 23 |
| 42 U.S.C. § 1395dd | 20 |
| Insanity Defense Reform Act of 1984 | 8, 13 |

*Cited Authorities*

*Page*

**Regulations:**

BOP Program Statement 5310.12 ..... 9

BOP Program Statement 6000.05 ..... 21

BOP Program Statement 6010.01 ..... 21

**Dictionaries:**

Dorland's Illustrated Medical Dictionary ..... 11

Miller-Keane Encyclopedia & Dictionary of Medicine, Nursing & Allied Health ..... 11

Taber's Cyclopedic Medical Dictionary ..... 11, 19

## TABLE OF APPENDICES

*Page*

Appendix A — Opinion Of The United States Court Of Appeals For The Eighth Circuit Dated And Filed March 11, 2003 ..... 1a

Appendix B — Order Of The United States District Court For The Western District Of Missouri, Western Division Dated And Filed June 21, 2002 ..... 12a

Appendix C — Report And Recommendation Of The United States District Court For The Western District Of Missouri, Western Division Dated And Filed May 21, 2002 ..... 14a

Appendix D — Opinion Of The United States Court Of Appeals For The Eighth Circuit Denying Petition For Rehearing Dated And Decided April 23, 2003 ..... 33a

Appendix E — Statutes And Rules Involved ..... 34a

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

## OPINIONS BELOW

The magistrate judge's report and recommendation (per Hays, M.J.) to imprison Mr. Ferro for treatment for up to four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the trial to proceed (Appendix ("Pet. App.") 14a-32a) is not otherwise published. The district court's opinion (per Wright, D.J.) adopting the magistrate judge's recommendation and ordering Mr. Ferro's commitment (Pet. App. 12a-13a) is not otherwise published. The court of appeals' opinion (per Webber, D.J., sitting by designation, joined by Loken[1] and Morris Sheppard Arnold, J.J.) affirming (Pet. App. 1a-11a) is published at 321 F.3d 756. The court of appeals' order denying rehearing by the panel (Pet. App. 33a) appears at 2003 U.S. App. LEXIS 7661.

## STATEMENT OF JURISDICTION

The court of appeals entered its opinion and order on March 11, 2003, and denied rehearing by the panel on April 23, 2003. Petitioners invoke this Court's jurisdiction under the "collateral order doctrine" exception to the final judgment rule as is fully discussed below in the "Reasons for Granting the Writ" section.

## STATUTORY PROVISIONS INVOLVED

The provisions of 18 U.S.C. §§ 4241, 4246 and 4247, relevant to this petition are reprinted in the Appendix at 34a-41a.

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1. Circuit Judge Loken became Chief Judge on April 1, 2003, subsequent to the opinion rendered in this case.

## STATEMENT OF THE CASE

Relevant events concerning Mr. Ferro may be summarized as follows:

1. On July 14, 1999, Mr. Ferro, along with his son and two other persons, was charged in a fifteen-count Indictment with engaging in an alleged fraudulent scheme to resell without authority pharmaceuticals secured at a discount, in violation of 18 U.S.C. §§ 2, 371, 982, 1341, 1956(h) and 2314. Pet. App. 14a-15a.

2. On October 1, 1999, Mr. Ferro's counsel moved for an extension of time to file a motion to determine if Mr. Ferro's *physical* impairments due to a stroke he suffered in November 1998 rendered him unable to effectively participate in his defense. See Pet. App. 18a-19a.

3. On October 12, 1999, while an investigation of Mr. Ferro's physical impairments was underway by Mr. Ferro's counsel, the Government, pursuant to 18 U.S.C. §§ 4241(a) and (b), moved for a determination by the Court of Mr. Ferro's mental competency to stand trial. See Pet. App. 18a-19a.

4. On December 20, 1999, a Government-selected expert issued his report of his outpatient evaluation of Mr. Ferro, and concluded that Mr. Ferro was not competent to stand trial as he was incapable of assisting counsel in his defense. Pet. App. 19a-22a.

5. On August 30, 2001, the Eighth Circuit issued its Mandate of its opinion reversing and remanding the decision of the District Court granting the Defendants' Motion to Dismiss the Indictment for Failure to State an Offense, holding that the materiality of an alleged misrepresentation can no longer be decided pretrial as a matter of law by the District Court due to this Court's holding in *United States v. Gaudin*, 515 U.S. 506,

523 (1995), but instead must be presented to a jury as required under *Gaudin*. *United States v. Ferro, et al.*, 252 F.3d 964 (8th Cir. 2001), *cert. denied*, 534 U.S. 1083 (2002).

6. On February 11 and 26, 2002, the Government expert conducted, at the request of Mr. Ferro's counsel, additional evaluations of Mr. Ferro, including the ordering of a MRI of his head, and concluded that Mr. Ferro's mental status had deteriorated significantly since 1999, he had suffered severe brain damage, that his higher cognitive functions were gone and would not return, and that he was incapable of assisting counsel in his own defense. The Government's expert further concluded that imprisoning Mr. Ferro for several months to evaluate his competency to stand trial would be "redundant and unnecessary," and opined that depriving Mr. Ferro of his support system for such a period would "compromise his already present dementia and make matters worse for him." Pet. App. 22a-24a.

7. On May 21, 2002, the Magistrate Judge's Report and Recommendation was filed, wherein the Magistrate:

> RECOMMENDED that the Court, after making an independent review of the record and applicable law, enter an order finding that Louie A. Ferro, Sr., is incompetent. It is further
>
> RECOMMENDED that the Court commit Louie A. Ferro, Sr., to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future defendant Ferro will attain the capacity to permit the trial to proceed.

In making the foregoing recommendation, the Magistrate noted that:

> Various courts have struggled with the issue of committing a defendant to the custody of the Attorney General for further ***testing*** when the defendant's condition is permanent, but the overwhelming consensus appears to be that the courts have no discretion and that they must comply with the procedures established by section 4241(d). (citations omitted) (emphasis added).

Pet. App. 27a, 31a-32a (emphasis added).

8. On June 21, 2002, the District Court by its Order adopted the Magistrate Judge's Report and Recommendation. Pet. App. 12a-13a.

9. On March 11, 2003, the Eighth Circuit held that it had jurisdiction to consider the appeal under the collateral order doctrine, and affirmed the District Court's Order of June 21, 2002. Pet. App. 1a-11a.

10. On April 23, 2003, the Eighth Circuit denied Mr. Ferro's petition for rehearing by the panel. Pet. App. 33a. Mr. Ferro then filed a motion for stay of mandate pending consideration by this Court of a petition for writ of certiorari that would be filed within the required ninety-day period. On May 8, 2003, the Eighth Circuit granted, in part, the requested stay by allowing Mr. Ferro an opportunity for thirty days to seek an additional stay from the Supreme Court. 2003 U.S. App. LEXIS 8693.

11. Mr. Ferro submitted an Application to Stay the Mandate within the period granted by the Eighth Circuit. On June 12, 2003, Justice Thomas denied the application.

12. This petition for a writ followed, along with a renewed Application to Stay the Mandate.[2]

## REASONS FOR GRANTING THE PETITION

This case presents important, unresolved jurisdictional, constitutional and statutory issues.

### I. This Case Presents An Important, Unresolved Jurisdictional Question.

Whether there is jurisdiction to consider an appeal of a pretrial order for involuntary incarceration under 18 U.S.C. § 4241(d)(1) of a person found under 18 U.S.C. § 4241(b) to be incompetent to aid in their defense has not been resolved by this Court.

The Eighth Circuit held that it had jurisdiction to consider Mr. Ferro's appeal of the District Court order at issue in this case even though the order was not a "final judgment." Pet. App. 7a. That holding was premised on the *Cohen* "collateral order doctrine," an exception to the final judgment rule when a lower court's order conclusively determines the disputed question, resolves an important issue completely separate from the merits of the action, and is effectively unreviewable on appeal from a final judgment. Pet. App. 5a-7a, citing *Flanagan v. United States*, 465 U.S. 259 (1984) and *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).

Four other Circuits have held that the type of order at issue in this case satisfies the "collateral order doctrine." *United States v. Filippi*, 211 F.3d 649, 650-51 (1st Cir. 2000); *United States v.*

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2. Mr. Ferro's Pretrial Services Officer advised Mr. Ferro's counsel on July 16, 2003, that the Bureau of Prisons (BOP) had designated Mr. Ferro to self-surrender on August 25, 2003, at the BOP facility in Butner, North Carolina.

*Gold*, 790 F.2d 235, 238 (2d Cir. 1986); *United States v. Boigegrain*, 122 F.3d 1345, 1349 (10th Cir. 1997); *United States v. Donofrio*, 896 F.2d 1301, 1303 (11th Cir. 1990). An additional two Circuits have reviewed the merits of § 4241(d)(1) commitment orders without discussing jurisdiction. *United States v. White*, 887 F.2d 705 (6th Cir. 1989); *United States v. Sherman*, 912 F.2d 907 (7th Cir. 1990).

This Court recently held that there was jurisdiction to consider an appeal under the "collateral order doctrine" where a person already in custody under 18 U.S.C. § 4241(d)(1) faced involuntary medication in an effort to make the person competent to stand trial. *Sell*, 2003 U.S. LEXIS 4594 at 21-22.

Mr. Ferro's circumstances are analogous to those facing the defendant in *Sell*. Mr. Ferro is facing involuntary imprisonment for treatment when he has already been found by the Government-selected expert to have permanent, untreatable brain damage rendering him incompetent to aid in his own defense. Mr. Ferro's liberty interests are just as important as Mr. Sell's expectation of privacy and security interests. Just as in *Sell*, the decision concerning Mr. Ferro conclusively determined the disputed question, resolved an important issue completely separate from the merits of the action, and would be effectively unreviewable on appeal from a final judgment.

In addition, Mr. Ferro has a right *not to tried*, since he has been found by the Government-selected expert to have permanent, untreatable brain damage rendering him incompetent to aid in his own defense. This would seem to fit the characterization of a circumstance meriting jurisdiction by this Court as described in the dissenting opinion in *Sell*. 2003 U.S. LEXIS 4594 at 45 (Scalia, J., joined by O'Connor and Thomas, JJ.).

## II. This Case Presents An Important, Unresolved Constitutional Question.

Whether the imprisonment of a *non-dangerous, untreatable* person suffering from a mental illness or disorder for *treatment* is permitted under the Constitution has not been resolved by this Court.

The commitment, even indefinitely, of *dangerous* persons suffering from mental illnesses has consistently been held by this Court to be within the bounds of due process mandated in the Constitution. *See, e.g.*, *Kansas v. Hendricks*, 521 U.S. 346, 378 (1997) ("This case does not require us to consider whether the Due Process Clause always requires treatment—whether, for example, it would forbid civil confinement of an untreatable mentally ill, dangerous person."); *Seling v. Young*, 531 U.S. 250, 262 (2001) ("For those individuals with untreatable conditions, however, we explained that there was no federal constitutional bar to their civil confinement, because the State had an interest in protecting the public from dangerous individuals with treatable as well as untreatable conditions. [Hendricks] at 366."); *Foucha v. Louisiana*, 504 U.S. 71 (1992); *Addington v. Texas*, 441 U.S. 418 (1979); *Humphrey v. Cady*, 405 U.S. 504 (1972); *Compagnie Francaise de Navigation a Vapeur v. Louisiana Bd. of Health*, 186 U.S. 380 (1902) (permitting involuntary quarantine of persons suffering from communicable diseases).

This Court appropriately has been cautious in permitting involuntary commitment of those suffering from mental infirmities. In particular, the Court has emphasized that a person who suffers from a mental disorder and who is committed solely on account of his incapacity to proceed to trial, may be deprived of liberty *for only*:

> the reasonable period of time necessary to determine whether there is a substantial probability that he will

> attain that capacity in the foreseeable future. If it is determined that this is not the case, *then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant*.

*Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (emphasis added). In *Jackson*, which was decided by a unanimous vote of the seven participating Justices, the Court reasoned, in an opinion delivered by Blackmun, J., that "[a]t the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Id. Jackson*, as explained in a concurring opinion in *Youngberg v. Romeo*, 457 U.S. 307 (1982), means that commitment without any "treatment" whatsoever would not bear a reasonable relation to the purposes of the person's confinement. *Id.* at 325-26 (Blackman, J., joined by Brennan, J., and O'Connor, J.).

The issue of whether "the provision of treatment, standing alone, can ever constitutionally justify involuntary confinement or, if it can, how much or what kind of treatment would suffice for that purpose" was acknowledged, but not decided in *O'Connor v. Donaldson*, 422 U.S. 563, 574 (1975). In *O'Connor*, the Court stated that "[w]here 'treatment' is the sole asserted ground for depriving a person of liberty, it is plainly unacceptable to suggest that the courts are powerless to determine whether the asserted ground is present." *Id.* at 574, citing *Jackson*, *supra*.

The *Jackson*-defined constitutionally permissible parameters for the commitment of a person solely on account of his incapacity to proceed to trial were codified, at least in part, in the Insanity Defense Reform Act of 1984 at 18 U.S.C. §§ 4241 and 4247. The sections of relevance to the issue here are those governing the "examination" of a person to determine if he has

the mental competence to understand the nature and consequence of the proceedings against him or to assist properly in his defense, §§ 4241(a) and (b) and 4247(b) and (c), and the "treatment" to restore his competence, § 4241(d). An "examination",[3] at the court's discretion, is performed on an outpatient and/or committed basis for no more than 30 days, subject to a possible 15-day extension. "Treatment" is on a committed basis only in the custody of the Attorney General for an initial period of no more than four months, subject to a additional reasonable period of time if the court finds that there is a substantial probability that the person will attain the capacity for the trial to proceed within the additional time period.

The "examination" process appears to be consistent with *Jackson* in that any commitment is for 30 days subject to a 15-day extension, and there is a reasonable relationship between the purpose of commitment and the nature of the commitment.

The "treatment" process also arguably appears to be consistent with the reasonable time period limitation in *Jackson*, though the reasonable relationship between the purpose of commitment – treatment – and the nature of the commitment does not exist if the person will not improve due to a permanent, irreversible condition.

Mr. Ferro thus submits that the District Court order directing his commitment for *treatment* when he is in fact *untreatable* is

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3. BOP examination protocol includes specifying the contents of an examination report to the court that must include: "[c]omment upon the presence or absence of brain damage, motor impairment, organic disorder, and other related physical disorders, and whether treatment could be beneficial or corrective." BOP Program Statement 5310.12, August 30, 1993, Chapter 9, Attachment A, Page 2. Pet. App. 44a. Thus, whether a person is *treatable* or *untreatable* should be known to the court prior to committing the person for *treatment* under 18 U.S.C. § 4241(d)(1) as the person's "prognosis" must be included in the report of the examination conducted by the psychiatrist or psychologist in the BOP or private sector. 18 U.S.C. §§ 4247(b) and (c).

defective as it does not afford him his due process protections under the Constitution. Such a commitment flies in the face of the standard in *Jackson* which requires a reasonable relationship between the nature and duration of a commitment and the purpose for which an individual is committed. *Jackson* at 738. Also, the concurring opinion in *Youngberg* brings the issue into clearer focus with the explanation that commitment without any treatment whatsoever would not bear a reasonable relationship to the purposes of the person's commitment. *Youngberg* at 325-26. In that concurring opinion in *Youngberg*, Justice Blackman explained the Court's holding in *Jackson* as follows:

> In *Jackson v. Indiana*, 406 U.S. 715 (1972), this Court, by a unanimous vote of all participating Justices, suggested a constitutional standard for evaluating the conditions of a civilly committed person's confinement: "At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Id.*, at 738. Under this standard, a State could accept a person for "safekeeping," then constitutionally refuse to provide him treatment. In such a case, commitment without treatment would bear a reasonable relation to the goal for which the person was confined.
>
> If a state court orders a mentally retarded person committed for "care and treatment," however, I believe that due process might well bind the State to ensure that the conditions of his commitment bear some reasonable relation to each of those goals. In such a case, commitment without any "treatment" whatsoever would not bear a reasonable relation to the purposes of the person's confinement.

457 U.S. at 325-26 (Blackman, J., joined by Brennan, J., and O'Connor, J.).

Finally, each of the Circuits that have considered this issue erred when they concluded that they were powerless to consider the permanency or untreatable nature of a condition prior to committing a person for *treatment*. See *Ferro*, Pet. App. 8a-9a[4]; *See also United States v. Shawar*, 865 F.2d 856, 861 (7th Cir. 1989) (After the District Court had refused to order commitment due to the lack of "any credible evidence that I find believable that there is a likelihood that he will improve as a result of a commitment to a federal facility," the Circuit Court reversed saying the District Court should not have considered the likelihood of recovery.); *United States v. Donofrio*, 896 F.2d 1301, 1302-03 (11th Cir. 1990) (Evidence concerning the permanency of the defendant's condition was presented at his competency hearing, though the Circuit Court affirmed the District Court's commitment of the Defendant saying that "permanency" was not "before" the District Court prior to its order, but would be after the 120-day evaluation); *United States v. Filippi*, 211 F.3d 649, 651 (1st Cir. 2000).

Instead, as this Court *reasoned*, without deciding, in *O'Connor*, courts do have the power to determine if there is a sufficient basis for *treatment* where it is the sole asserted ground for depriving a person of liberty. *O'Connor* at 574, citing *Jackson, supra*.

Mr. Ferro consistently argued before the Eighth Circuit in his briefs and other pleadings, and at oral argument, that the

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4. The Eighth Circuit attempted to redefine the meaning of "treatment" as to encompass more than "improvement." Neither regulations of the BOP, see pages 20-21 below, nor recognized medical authority lend any support to such a redefinition. Three medical dictionaries - Dorland's Illustrated Medical Dictionary; Miller-Keane Encyclopedia & Dictionary of Medicine, Nursing & Allied Health; and Taber's Cyclopedic Medical Dictionary – define "active treatment" virtually in an identical manner: Dorland's: "that which is directed immediately to the cure of a disease or injury;" Miller-Keane: "treatment directed immediately to the cure of the disease or injury;" Taber's: "treatment directed specifically toward cure of a disease."

contested order violates his due process and equal protection rights under the United States Constitution in that he would be deprived of his liberty without due process of law, since there is no rational basis for the hospitalization for *treatment* of an *untreatable* person. In response, the Eighth Circuit stated that "treatment" encompasses more than "mere improvement" – it includes "diagnosis" and "determination" as defined by the *Filippi* and *Donofrio* Courts, and "[t]he limited time period of hospitalization minimizes potential harm to the defendant and comports with due process. [*Filippi*] at 652 (finding the statute constitutional because it is 'flexible and case oriented in determining the length of incarceration')." *Ferro*, Pet. App. 10a-11a. If "diagnosis" is the true purpose for commitment, then to be permissible under the Constitution the commitment should have been ordered under the "examination" statutes, 18 U.S.C. §§ 4241(a) and (b) and 4247(b) and (c), not the "treatment" statute, 18 U.S.C. § 4241(d).

This Court in *Sell* held, in order to meet Constitutional requirements, that lower courts must find, prior to involuntarily medicating a person in custody under 18 U.S.C. § 4241(d)(1), that such treatment "is substantially likely to render the defendant competent to stand trial." 2003 U.S. LEXIS 4594 at 27. Though this Court in *Sell* did not mention the *reasoning* in *O'Connor* that courts have the power to determine if there is a sufficient basis for *treatment* where it is the sole asserted ground for depriving a person of liberty, *O'Connor* at 574, citing *Jackson*, *supra*, the holdings in *Sell* seem to embody that reasoning. Surely, therefore, to be in accord with Constitutional requirements, and to be consistent with the *reasoning* in *O'Connor* and the holdings in *Sell*, lower courts can now be empowered to consider the permanent, *untreatable* nature of a defendant's condition prior to ordering the defendant imprisoned for *treatment*.

## III. This Case Presents An Important, Unresolved Statutory Question.

Congress enacted the Insanity Defense Reform Act in 1984. The portions of that Act relevant to the issue in this case were codified at 18 U.S.C. §§ 4241, 4246 and 4247, and are reproduced in the appendix. Pet. App. at, respectively, 34a-35a, 36a-38a, 39a-41a.

### A. The Statutory Scheme

The statutory scheme involves several steps. First, "if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable . . . to assist properly in his defense," the defendant or the Government can request a hearing to determine the defendant's mental competency, or in the absence of such a request, the Court on its own motion can set a hearing. 18 U.S.C. § 4241(a).

Second, prior to the hearing, the Court "*may* order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c)." 18 U.S.C. § 4241(b) (emphasis added). The relevant subsections of 4247 provide that any examination "*shall* be conducted by a licensed or certified psychiatrist or psychologist" and that the Court "*may* commit the person to be examined for a reasonable period, but not to exceed thirty days . . . to the custody of the Attorney General for placement in a suitable facility" (emphasis added). Further, the report of the examination "*shall*" include:

(1) the person's history and present symptoms;

(2) a description of the psychiatric, psychological, and medical tests that were employed and their results;

(3) the examiner's findings; and

(4) the examiner's opinions as to diagnosis, ***prognosis***, and –

(A) if the examination is ordered under section 4241, whether the person is suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense;

* * *

(C) if the examination is ordered under section . . . 4246, whether the person is suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another.

(emphasis added).

Third, if after the hearing the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court:

> ***shall commit*** the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant ***for treatment*** in a suitable facility –

(1) for such a reasonable period of time, not to exceed four months, ***as is necessary to determine*** whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the trial to proceed; and

(2) for an additional reasonable period of time until –

(A) his mental condition is so improved that trial may proceed, if the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the trial to proceed; or

(B) the pending charges against him are disposed of according to law; whichever is earlier.

If, at the end of the time period specified, it is determined that the defendant's mental condition has not so improved as to permit the trial to proceed, the defendant is subject to the provisions of section 4246.

18 U.S.C. § 4241(d) (emphasis added).

Finally, the dangerousness determination procedure under 18 U.S.C. § 4246 is not automatic as the Eighth Circuit stated in *Ferro*, Pet. App. 8a, nor does 18 U.S.C. § 4241 and § 4246, "read together, entitle the government to a dangerousness hearing

before a defendant is released due to incompetency to stand trial," Pet. App. 11a, but instead is invoked only if:

> the director of a facility in which a person is hospitalized certifies that a person in the custody of the Bureau of Prisons . . . who has been committed to the custody of the Attorney General pursuant to section 4241(d) . . . is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, and that suitable arrangements for State custody and care of the person are not available.

18 U.S.C. § 4246(a).

**B. The Important, Unresolved Statutory Issue**

The problem for Mr. Ferro, and others in his class of *untreatable* persons who are incompetent to assist in their defense, is that while 18 U.S.C. §§ 4247(b) and (c) require that medical professionals determine the prognosis for these persons and so advise a court, the courts then effectively ignore the prognosis if it defines a permanent and thus untreatable condition. Instead the courts focus solely on the "shall commit" language in 18 U.S.C. § 4241(d) without proper consideration of the words that follow – "treatment," "as is necessary," and "attain the capacity to permit the trial to proceed," and claim the courts are powerless to even consider that a person's condition is permanent and thus untreatable. *See Ferro*, Pet. App. 8a-9a; *See also United States v. Shawar*, 865 F.2d 856, 861 (7th Cir. 1989); *United States v. Donofrio*, 896 F.2d 1301, 1302-03 (11th Cir. 1990); *United States v. Filippi*, 211 F.3d 649, 651 (1st Cir. 2000).

But Mr. Ferro's factual circumstances are distinguishable because in this case the Government-selected expert concluded that Mr. Ferro suffers from untreatable severe brain damage, as corroborated by an unimpeachable MRI examination, that has caused cognitive impairments making it impossible for Mr. Ferro to adequately assist in his own defense. *See Ferro*, Pet. App. 11a (". . . the medical reports . . . showed by a preponderance of the evidence that the condition was permanent. . . .")

Mr. Ferro submits that the District Court order directing his commitment for *treatment* when he is in fact *untreatable* is defective in that the relevant statute does not authorize commitment for treatment of an untreatable person.

This Court, in *Robinson v. Shell Oil Company*, 519 U.S. 337, 340-41 (1997) (citations omitted), provided the instructions on interpreting a statute, as follows:

> Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. Our inquiry must cease if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'
>
> The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.

One of the relevant provisions here, 18 U.S.C. § 4241(d)(1), reads as follows:

> (d) Determination and disposition. – If, after the hearing, the court finds by a preponderance of the

> evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court ***shall commit*** the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant ***for treatment*** in a suitable facility –
>
> > (1) for such a reasonable period of time, not to exceed four months, **as is necessary to determine** whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the trial to proceed;

(emphasis added).

The context of this statute is clear. Treatment should be undertaken to restore a defendant's mental capacity so as to permit the trial to proceed. The intent of Congress in enacting this statute is thus clear from the statute. *See Robinson*, 519 U.S. at 340 ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."); *also see Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring) ("The meaning of terms on the statute books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the whole Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of

law into which the provision must be integrated – a compatibility which, by a benign fiction, we assume Congress always has in mind.")

Even though the context is clear, the words utilized, and the organization of those words, create ambiguities. *See Robinson*, 519 U.S. at 340; *also see Green*, 490 U.S. at 528 (Scalia, J., concurring). Courts interpreting this statute, as discussed above at pages 11 and 16, generally have focused solely on the words "shall commit," without proper consideration of the words that follow – "treatment," "as is necessary" and "attain the capacity to permit the trial to proceed." Indeed some of those courts have redefined "treatment" to include "diagnosis" as that latter word is used in the examination sections of the statute, 18 U.S.C. §§ 4241(a) and (b) and 4247(b) and (c). *Ferro*, Pet. App. 10a-11a; *Filippi*. 211 F.3d at 651; *Donofrio*, 896 F.2d at 1303.[5]

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5. "Diagnosis" and "examination" mean the same thing. Taber's Cyclopedic Medical Dictionary defines "diagnosis" as

> [t]he use of scientific and skillful methods to establish the cause and nature of a sick person's disease. This is done by evaluating the history of the disease process; the signs and symptoms present; laboratory data; special tests such as x-ray pictures and electrocardiograms. The value of establishing a diagnosis is to provide a logical basis for treatment . . . .

*Taber's* defines "examination" as "[t]he act or process of examining the body to determine the presence or absence of disease." On the other hand, "treatment" has an entirely different meaning from "diagnosis" or "examination." *Taber's* defines "treatment" as "[a]ny specific procedure used for the cure or the amelioration of a disease or pathological condition."

Congress recognized these different meanings by, for example, using "examination" and "treatment" to convey different meanings. In 10 U.S.C. § 1077(a)(5) and (7), Congress defined the types of health

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Respectfully, such reasoning produces an absurd and harmful result – the incarceration of Louie Ferro, Sr., whom the *Government's* psychiatrist has found to be *untreatable* due to organic brain damage, for *treatment* in a prison away from his family and support group. See *Green*, 490 U.S. at 528 (Scalia, J., concurring) ("We are confronted here with a statute which, if interpreted literally, produces an absurd, and perhaps unconstitutional, result.") There are two classes of persons found to be "presently suffering from a mental disease or defect rendering [them] mentally incompetent to the extent that [they are] unable to understand the nature and consequences of the proceedings against [them] or to assist properly in [their] defense." One class is comprised of persons with *treatable* conditions. The other class is comprised of persons, like Mr. Ferro, with conditions that are *untreatable*.

Regulations of the BOP also underscore the *treatment* purpose of such hospitalization. For example, BOP Program

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care that could be provided to include (5) ***[t]reatment*** of nervous, mental, and chronic conditions, and (7) [p]hysical ***examinations*** . . . ." (emphasis added). Also, in 42 U.S.C. § 1395dd which is entitled "Examination and treatment for emergency medical conditions and women in labor," Congress mandated a two-step process, beginning with an examination to determine if a certain medical condition existed, which was to be followed, under specific circumstances, with treatment if consented to by the patient.

18 U.S.C. § 4241 also provides for a two-step process for examination and treatment. The two-step process begins with an examination under § 4241(b) and treatment under § 4241(d). BOP regulations track this two-step process by (1) recognizing the ethical conflict in the same psychologist participating in the "examination" and "treatment," and (2) directing those roles be performed by different psychologists. Pet. App. 42a-43a.

Accordingly, reading "diagnosis" into the word "treatment" is unsupported when the *Robinson* Court's instructions concerning statutory analysis are applied.

Statement 6000.05, dated September 15, 1996, at Chapter IX, page 4, includes the requirement that "It is the clinical staff's obligation to attempt to restore this individual to competency to stand trial within the time frame allowed."[6] Pet. App. 46a.

Read sensibly, 18 U.S.C. § 4241(d) should only apply to the class of *treatable* persons whose conditions may in fact improve, but not to a class, including Mr. Ferro, of *untreatable* persons whose permanent, irreversible conditions cannot improve. The language "as is necessary" naturally leads to this conclusion. The statute plainly states that "[t]he Attorney General shall hospitalize the defendant for *treatment . . . as is necessary. . . .*" *Id.* (emphasis added). Thus any application of 18 U.S.C. § 4241(d) to the class, including Mr. Ferro, of *untreatable* persons whose permanent, irreversible conditions

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6. The BOP recognizes that, even where the person has been hospitalized under 18 U.S.C. § 4241(d), it cannot administer involuntary treatment, including medication, without "proper due process procedures." BOP Program Statement 6010.01, dated September 21, 1995, pp. 1, 3-6. Mr. Ferro, of course, is not competent to participate in the due process procedures outlined in BOP Program Statement 6010.01, just as he is not competent to assist in his own defense, which raises an interesting issue whether any treatment, including medication, administered by the BOP would violate Mr. Ferro's due process rights.

Since the issuance of this regulation in 1995, this Court decided in *Sell*, *supra*, that a person does indeed have due process rights that must be accommodated prior to the involuntary administration of medication, including a determination by a lower court that involuntary medication is substantially likely to render the defendant competent to stand trial and is medically appropriate. Moreover, this Court established in *Sell* a requirement that a lower court "must find that any alternative, less intrusive treatments [than involuntary medication] are unlikely to achieve substantially the same results." Mr. Ferro submits that implicit in that holding is that the person has been found to be treatable, though this Court in *Sell* did not specifically so hold, nor did this Court in *Sell* reach the broader question of whether any treatment first requires a finding by a lower court that the person is indeed treatable.

cannot improve would violate constitutional due process requirements, a result that can and should be avoided by appropriately construing the statute.

Mr. Ferro indisputably has severe, permanent, untreatable brain damage that is readily confirmed by medical tests. Mr. Ferro does not have a "mental illness" that is difficult to diagnose and which is prone to "faking" that could be discovered through the application of a 30-day period of "examination" under the watchful eye of experts in the BOP as authorized by 18 U.S.C. § 4241(b) and 18 U.S.C. § 4247(b). In this case, the Government did not seek an examination by the BOP under 18 U.S.C. § 4241(b) and 18 U.S.C. § 4247(b), nor did the Court deem such a commitment necessary, relying instead on an outpatient evaluation of Mr. Ferro as ordered by the Court in its discretion.

The only authority for the imprisonment of an untreatable person is where the person is also a danger to society, which not even the Government claims Mr. Ferro is. There simply is no reasonable relationship between confining Mr. Ferro for four months and any purported *treatment* because his condition is permanent and irreversible. The question whether this federal statute compels courts to order an unconstitutional involuntary commitment is an important issue that merits plenary review by this Court.

The evidence is clear that Mr. Ferro does indeed suffer from an *untreatable* condition that renders him incapable of assisting in his defense. Incarceration for *treatment* is a futile exercise that will take away from him the meager quality of life left for him. Mr. Ferro is an 81-year-old gentleman in the twilight of his life whose wife struggles daily to make the quality of his life as good as she can make it, given his deteriorating mental capacity. Should Mr. Ferro be required to be incarcerated for *treatment* in an effort to restore his competency, we will find

ourselves at the end of that exercise at the same point that we are today – Mr. Ferro has dead brain tissue – his cognitive reasoning is gone and will never return.

Mr. Ferro is not a danger to society. It is not necessary to place Mr. Ferro in an environment which carries the real risk of real harm to him by incarceration away from family and support groups that permits his tenuous line to reality to be maintained.

* * * *

Determining by way of *examinations* if a non-dangerous person like Mr. Ferro 1) suffers from a mental disease or defect that renders him incapable of assisting in his own defense; 2) is or is not dangerous to himself or others; and 3) has a *treatable* mental disease or defect, either on an outpatient basis and/or by commitment to the custody of the Attorney General for a limited period, appears to fall within the constitutional boundaries this Court has drawn. The statutory scheme as codified at 18 U.S.C. § 4241(b) and 18 U.S.C. § 4247(b) and (c), provides for all of that, though the wording could be improved to make the meaning of "prognosis" crystal clear that it includes the need to opine as to whether the mental disease or defect is treatable or untreatable, and whether the person is or is not a danger to himself or others.

Should such an *examination*, conducted on an *outpatient* basis by someone other than a BOP-associated expert, report that the person is *untreatable* then the lower court in its discretion could determine if an additional *examination* by a BOP-associated expert should be conducted either on an outpatient or committed basis, under 18 U.S.C. § 4241(b) and 18 U.S.C. § 4247(b).

Should such *examinations* report that the person is *treatable*, then the statutory scheme as codified at 18 U.S.C. § 4241(d) can be followed without going beyond constitutional boundaries.

But should such *examinations* report that the person is *untreatable*, then the statutory scheme lacks clear direction due to 18 U.S.C. § 4241(d) specifically requiring commitment *for treatment*. In that circumstance, the lower court could follow the *apparent* authority laid out by this Court in *O'Connor*, 422 U.S. at 574, and in *Sell*, *supra*, and exercise its power to find the person incompetent to assist in his own defense and non-dangerous. Also, the lower court could in that circumstance simply follow the Bail Reform Act and continue the existing bond. The United States then would have the option to voluntarily move to dismiss the indictment. If the United States did not do so, then the defendant could move for dismissal of the indictment.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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